NO. 84-1667

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

BETHEL SCHOOL DISTRICT NO. 403, ET AL.,
Petitioners,

V.

MATTHEW N. FRASER, A MINOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE, TEXAS COUNCIL OF SCHOOL ATTORNEYS

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INTEREST OF AMICUS CURIAE

The Texas Council of School Attorneys is a nonprofit association of attorneys and counselors for school districts throughout the State of Texas. Its interest in the present case lies in its members' duty to give advice on legal matters to these school districts, which attempt to comply with the law while making sound educational decisions. Amicus curiae is concerned that the law may not provide room for sound educational policy if the decision below is not reversed. Because of their experience in regularly representing school districts, the members of amicus curiae may be in a position to assist the Court in developing the issues more fully.

STATEMENT OF THE CASE

Amicus Curiae adopts the statement of the case made by Petitioners.

SUMMARY OF ARGUMENT

The decision below fails to protect the first amendment right of the students in a captive audience not to listen to offensive utterances. It further fails to recognize the right of parents to ensure that their children are receiving "appropriate training" in the schools, and the right of school administrators not to be forced to sponsor and condone activity that is contrary to the moral values of the community to which they are responsible. The inevitable effect of the decision below will be contrary to first amendment values because it will make teachers hesitant to hold similar assemblies in the public schools.

The decision below fails to give due deference to the expertise and authority of the school administrators to make decisions affecting the students, taking into consideration the makeup of the student body, particularly the age of the students, and the effect given behavior is likely to have on the learning environment of the school, on discipline, and on the self-esteem of female students. If the school is prevented from responding to these concerns, the result will be less community control and reduced public confidence in the public schools.

ARGUMENT AND AUTHORITIES

I. THE DECISION BELOW FAILS TO GRANT ANY RECOGNITION TO FIRST AMENDMENT RIGHTS OF STUDENTS IN A CAPTIVE AUDIENCE, OF SCHOOL ADMINISTRATORS, OF PARENTS WHO DESIRE TO INFLUENCE THE MORAL UPBRINGING OF THEIR CHILDREN, OR OF PERSONS IN

THE ELECTORATE WHO WISH TO AVOID SPONSORING INAPPROPRIATE UTTERANCES.

A. A captive audience has a right not to be subjected to utterances or activity that it should be able to choose not to hear, and this right is protected by the first amendment.

The right to speak includes the right not to listen.[1] In particular, it includes the right of a captive audience[2] to avoid being subjected to obscene, indecent or otherwise inappropriate utterances forced upon members of that audience. *FCC v. Pacifica Foundation*, **438 U.S. 726 (1978),** *citing Rowan v. United States Post Office Department*, **307 U.S. 728 (1970). The rights of the**

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1 This Court stated in Tinker v. Des Moines Independent Community School District, 303 U.S. 503, 513 (1969), that

> conduct by the student, in class or out of it, which for any reason—whether it seems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

2 That the students were a captive audience even the assembly was "voluntary" is clear when one considers that the only option they had was to attend study hall, that they would normally expect to hear such speech at the assembly, and once it has been heard, the right of the student to walk out (if it is even reasonable to expect that a high school student would choose this option in front of his peers) clearly does not protect his right to not be subjected to the speech. As this Court stated in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), in rejecting the argument that the ability to turn off the radio was sufficient protection against being subjected to indecent language on the radio,

> To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place.

Id. at 748-49.

listener are paramount when "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erzoznik v. Jacksonville*, 422 U.S. 205 (1975); *see also Redrup v. New York*, 386 U.S. 767, 768 (1967).

The rights of the captive audience in *Lehman v. Shaker Heights*, 418 U.S. 298 (1974), resulted in a decision that a city had a right to refuse a political candidate's advertising on its bus system. The Court determined that the "nature of the forum and the conflicting interests involved," precluded the holding that the candidate had a first amendment right to place the advertisement, because the interests of the captive audience in not listening to what they did not want to receive were the significant constitutionally protected interests. The present case involves more offensive utterances, an audience that is physically captive, and a stronger argument for the first amendment right not to be subjected unwillingly to such utterances, than in *Lehman*.

B. *Parents, administrators, and others have a first amendment right to avoid sponsoring activity that interferes with the important educational function of preserving the moral values of the society, a right repeatedly recognized by this court.*

The decision below prevents parents from exercising the right to ensure the "appropriate training" of their children. This right has a first amendment basis. *Cf. Pierce v. Society of Sisters*, 268 U.S. 510, 532 (1925). Even if they did not have such a right, they have the right to avoid association with, and to "refuse to foster," utterances that they find "morally objectionable." *Wooley v. Maynard*, 430 U.S. 705 (1977). The decision below gives no recognition to the very real first amendment rights of parents to send their children to a school at which they are not forcibly subjected to offensive, obscene or immoral utterances that are promulgated in the name of the school or its sponsorship. The decision below, which recognizes no limits to the power to utter such material to an audience that must be present in school, would prevent parents from exercising that first amendment right.

Additionally, the decision below puts school administrators in the position of having to sponsor, whether their educational judgments would allow it or not, utterances that are contrary to the moral values held by many in the community. This forced sponsorship is especially repugnant given this Court's repeated statements that one of the major functions of the public schools is to preserve the moral values of the society. *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (school administrators' judgments must prevail unless they attempt forcibly to promulgate a single "orthodoxy" in thought, which administrators here were clearly not attempting to do); *Ambach v. Norwich*, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, has long been recognized.")

The decision below forces administrators, in discharging this important educational function,[3] to associate themselves with the sponsorship of utterances that they should be free to "refuse to foster" because they and parents of children, to whom they are responsible, find them "morally objectionable" and hence inconsistent with this important educational purpose. *Wooley*, supra. The decision below gives neither recognition nor

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3 [O]ne of public education's principal functions always has been to indoctrinate a generation of children with the values, traditions, and rituals of society. Sociologists generally accept the necessity of society's transmitting its cultural and moral values to the next generation through a process of socialization; in the United States this socialization process occurs not only in the family, but also in the public educational system. Thus, "education involves inducting the individual into the communities on which he depends for his material welfare, his cultural development, and his spiritual growth . . . It includes . . . 'the acquisition of the arts, the sciences, and the moral attitudes of civilization.' "

Diamond, The First Amendment and Public Schools: The Case Against Judicial Intervention, 59 TEX. L. REV. 477, 498 (1981) (quoting I. B. Berkson, The Ideal and the Community 285 (1958)) (other footnotes omitted).

protection to these important first amendment interests. In particular, the implication of the court below that it is inappropriate for the schools to recognize such rights as these because they represent "middle class standards" displays a lack of awareness of the function of the schools in this important area.

C. *The result of the decision below will be to limit the opportunities of all other students for expression in similar assemblies, because parents rightly will not tolerate a situation in which administrators must sponsor indecent utterances to captive audiences of students.*

The school is certainly not required to offer the students the opportunity to conduct an assembly such as the one involved here. If in conducting the assembly, it is forced into a position which will lower its esteem with the community, subject it to the criticism and protests of parents, and undermine its effectiveness in educating and disciplining students, the obvious solution is simply not to conduct the assembly. In fact, if it is prevented from reasonably supervising the assembly, discontinuation may be the only solution. This solution would deprive the rest of the student body of an important educational and communicative opportunity, with no compensating gain.

In providing for this school assembly, the school has expended time and resources that could have been used in other more intellectual pursuits. Apparently the school administration felt that there was educational value in holding such an assembly, such as giving some students an opportunity to participate in public speaking, allowing all students to participate in some manner, as candidates, workers, or voters, in a political process, and encouraging responsible decision-making. Yet this learning experience is not the only one taking place in the school, and is not even the primary one. If the school is to continue to offer such an opportunity, it must be able to keep it in its proper perspective.

II. THE DECISION BELOW FAILS TO AFFORD PROPER DEFERENCE TO THE AUTHOR-

ITY AND EXPERTISE OF SCHOOL ADMINISTRATORS, WHO NECESSARILY MUST DECIDE, ON A DAILY BASIS, WHAT THE GROUND RULES MUST BE FOR ACTIVITIES BOTH RELATED TO SPEECH AND UNRELATED TO IT.

A. The public school setting is a special setting, in which indecent activity or speech must be treated differently than in society at large.

This Court has long recognized "the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct [4] in the schools." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 507 (1969) (footnote added). It must be remembered that the public schools serve all students in the community. Gifted students, handicapped students, autistic children, mentally retarded children, and a wide variety of others are within the care of administrators of the schools acting in varied degrees of in loco parentis. The schools include high schools with achievement oriented children and elementary children as young as three, who are from both high achievement and deprived backgrounds.

The State has greater ability to protect children from exposure to inappropriate utterances than adults, even in the larger

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4 Matt Fraser's method of expression is more like conduct than speech, not only in its effect on other students, but also in the fact that the sexual innuendo is "no essential part of any exposition of ideas," and of "such slight social value as a step to truth that any benefit . . . is clearly outweighed by the social interest in order and morality." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). This Court noted that the passive expression of opinion in Tinker, on the other hand, although involving conduct rather than words, was more like "pure speech" than conduct, because of its strong communicative content, Tinker, supra at 505, 508, and therefore afforded it greater protection than is warranted under the facts herein.

society outside school. See *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (*citing Prince v. Commonwealth of Massachusetts*, 321 U.S. 158, 170 (1962)), pointing out that it was at least rational to limit the availability of offensive materials to minors under seventeen. *Ginsberg, supra* at 639. In a four-year high school many of the students would be much younger than seventeen, and the fact that they have been included in public secondary education indicates a judgment by society that this is an impressionable and important time for learning not only academics, but the values of society.

It is not necessary that the behavior be as disruptive as would be required in a non-school setting for the school to be allowed to regulate it.[5] What is disruptive of the learning process is more for the educational experts than for the courts to determine. The disruption could consist of a mental preoccupation as well as a physical disturbance. The proper role of the school and the judiciary has been described as follows:

> The judiciary cannot know the extent to which any kind of distraction during the course of the day interferes with learning. A court can observe that fistfights did not break out and that no one complained about being prevented from doing his work. But the court cannot begin to know even the amount of distraction that actually occurred, either in the students' minds or beyond their awareness. In the street corner context, the court can say that

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5 The Ninth Circuit further suggests that the appropriateness of Respondent's speech "is for his fellow students to judge when they cast their ballots in the school election." Fraser, supra at 1363. Yet this too ignores the role of the school. The question here is not student approval, but the right and ability of the school to seek a higher standard of behavior from students. It is not unusual for disrespectful behavior to meet with student approval, but that does not necessarily mean it is to be encouraged. If the students are to set the standards for conduct, are they likewise to plan the school menus, design the curriculum, and determine how much homework is to be assigned?

> distraction does not matter and can measure the functioning of the institution by whether people can use the streets. The lack of knowledge about what really enables people to learn and about the complex interrelationships of the variables involved prevent courts from judging that no interference has taken place in the school. Here, courts should defer to the good faith judgment of the expert authorities.

Diamond, *supra* at 497-98.

A major concern in the school setting is the effect such a speech may have on discipline generally, not simply on the immediate situation. *See* Haskell, *Student Expression in the Public Schools: Tinker Distinguished*, 59 GEO. L. J. 37, 50 (1970). Sexually suggestive language used blatantly in the presence of authority figures who are sure to not approve carries with it an unmistakable message of insubordination. In fact, Respondent has admitted as much in stating in his brief that he "wished to demonstrate . . . that . . . he had the . . . guts to stand up before the administration and deliver a speech which . . . the administration would find inappropriate." *Response to Petition for Certiorari* at 16. There is a danger to the entire learning process if this motive overcomes educational purposes. In fact, a fair reading of the Ninth Circuit's opinion would indicate that a student could openly insult a teacher in the classroom, and, if the class refrained from disruptive reaction, the teacher would not be able to impose discipline without violating the student's first amendment rights.

The impact of these utterances on the audience is another aspect that should be left to educators. At trial, an educational expert testified that this speech was "sexually harrassing to female students" and therefore "disruptive to the learning process." J. App. 79 & 72-81. This verbal sexual assault is demeaning to such students and lowers their self-esteem and ability to function equally with male students, in the same way that a racial or ethnic slur would. The extent of the harm can be appreciated by imagining the next person to address the captive audience, who might be a female student sponsoring a female

candidate for president; this student cannot and should not be forced to compete by similar kinds of offensive rape metaphors. The opinion below disallows any rational exercise of important educational administrative judgment in this regard.

B. In a public school, teachers and administrators should have room to consider the purpose of speech-related activity, as well as the time, place, and manner in which it occurs.

In *Connick v. Meyers*, 461 U.S. 138 (1983), this Court had occasion to consider utterances that were subject to administrative balancing concerns in another context. The distinction drawn in *Connick* was between discussion of public issues and utterances furthering purely private concerns of the person issuing them. An analogous principle is applicable here. The remarks in question were not intended to advance discussion of real public issues; instead, they were designed to insult persons responsible for maintaining decorum, designate the speaker as a big wheel, and show, in Respondent's own words, that he had "guts." These private purposes, as in *Connick v. Meyers*, justify greater deference to administrative concerns to protect other persons' rights.

Furthermore, schoolteachers and administrators clearly have the authority to consider the "time, place and manner" in which speech-related activity is conducted. *Papish v. Board of Curators*, 410 U.S. 667 (1973); *FCC v. Pacifica Foundation, supra.* If the utterances in question had occurred on the school yard or parking lot with only twenty acquaintances of the speaker present, they would have been dramatically different from the officially sanctioned assembly held before a captive audience in this case.

C. The effect of this decision will be to undermine public confidence in the public schools.

One of the major strengths of the educational system in this country has been the support and involvement of the local community. Yet the decision below impedes the ability of the community to control its schools, and to influence the quality

of the overall education of its children. The dissatisfaction and loss of confidence in the schools which necessarily follows for many parents tends to cause those with the opportunity and financial ability to send their children to private schools where their children can be educated in a manner more acceptable to them. However, if the decision below is allowed to stand, those without the wherewithal to choose this option must stay with the public schools and see decisions that are rightfully theirs being made by the judiciary instead.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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